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No. 88-1053

In the Supreme Court of the United States

OCTOBER TERM, 1988

THE ASSOCIATION OF THE BAR OF THE CITY OF NEW YORK, PETITIONER

v.

COMMISSIONER OF INTERNAL REVENUE

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

Whether petitioner's practice of rating candidates in judicial elections constitutes "participat[ion] in, or interven[tion] in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office" within the meaning of Section 501(c)(3) of the Internal Revenue Code, thereby precluding petitioner from qualifying for tax-exempt status under that section, rather than under Section 501(c)(6).

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-13a) is reported at 858 F.2d 876. The opinion of the Tax Court (Pet. App. 14a-41a) is reported at 89 T.C. 599.

JURISDICTION

The judgment of the court of appeals (Pet. App. 44a-45a) was entered on September 27, 1988. The petition for a writ of certiorari was filed on December 23, 1988. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. Petitioner was incorporated as a bar association in 1871 to promote the legal profession and the administration of justice. One of its significant activities is rating

candidates for elective and appointive judgeships on municipal, state, and federal courts that sit in New York City. Pet. App. 3a. This activity is undertaken pursuant to petitioner's bylaws, which provide that its Committee on the Judiciary "shall endeavor to secure the nomination, election, certification, or appointment of qualified candidates, [and] to prevent the nomination, election, certification, or appointment of unqualified candidates" (*id.* at 6a).

The task of considering the candidates' qualifications and determining the ratings is assigned to petitioner's Committee on the Judiciary. The Committee considers a candidate's professional ability, experience, character, and temperament. It then rates the candidates as either "approved," "not approved," or "approved as highly qualified," and those ratings are communicated to the public in the form of press releases.[1] A "not approved" rating sometimes is accompanied by a short statement explaining the reasons for the rating; no explanation is given for an "approved" rating. Of approximately 270 candidates for elective judgeships evaluated from 1980 through 1984, somewhat more than half were "approved," somewhat less than half were "not approved," and five were "approved as highly qualified." Pet. App. 3a, 19a-21a.

Petitioner has long been recognized as a "business league" exempt from tax under Section 501(c)(6) of the Internal Revenue Code.[2] In 1982, petitioner applied to the

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[1] The record also states that the ratings are published in petitioner's journal, which is distributed to its members and to approximately 120 other subscribers, including law libraries and law schools. Petitioner states, however, that this practice was discontinued in 1981. See Pet. App. 21a n.4.

[2] Unless otherwise noted, all statutory references are to the Internal Revenue Code of 1986 (26 U.S.C. (Supp. IV 1986)), as amended (the Code or I.R.C.).

Commissioner for recognition as a "charitable" and "educational" organization under Section 501(c)(3) (Pet. App. 4a, 16a). Qualifying for tax-exempt status under Section 501(c)(3) would confer additional tax advantages upon petitioner and its contributors. For example, a donation to a Section 501(c)(3) organization is deductible as a charitable contribution for purposes of computing the donor's income, estate, or gift tax liability (see I.R.C. §§ 170(c)(2), 2055(a)(2), and 2522(a)(2)), whereas contributions to a Section 501(c)(6) business league are not deductible. Correspondingly, there are additional limitations on eligibility for Section 501(c)(3) exempt status. In particular, Section 501(c)(3) organizations, unlike business leagues, may not "participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office."[3]

2. The Commissioner denied petitioner's application on the ground that its practice of rating candidates for elective judicial office constitutes intervention or participation in political campaigns, which is prohibited for a Section 501(c)(3) organization (Pet. App. 4a, 42a-43a).[4] Pursuant to Section 7428(a) of the Code, petitioner

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[3] The parenthetical phrase "or in opposition to" was added to Section 501(c)(3) by Section 10711(a) of the Omnibus Budget Reconciliation Act of 1987, Pub. L. No. 100-203, 101 Stat. 1330-464. The legislative history accompanying this amendment explains that it is a "statutory clarification," and that "[t]he same rule applies, pursuant to Treasury Regulations, to activities occurring on or prior to the date of enactment." H.R. Rep. No. 391, 100th Cong., 1st Sess. 1622 (1987); H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 1018 (1987). See Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii).

[4] The Commissioner has made no claim that petitioner's practice of rating candidates for *appointive* judgeships is inconsistent with Section 501(c)(3) status.

brought an action in the Tax Court for a declaratory judgment that it qualifies as a Section 501(c)(3) organization. The Tax Court, in a 10-6 decision, held for petitioner, ruling that its judicial rating activity does not constitute prohibited intervention in political campaigns (Pet. App. 14a-32a).

The Tax Court majority acknowledged that it is "obvious that the ratings are published with the hope that they will have an impact on the voter" (Pet. App. 31a), but it concluded nonetheless that the ratings are permissible under Section 501(c)(3), stating that "[t]he ratings do not support or oppose the candidacy of a particular individual or recommend that the public vote for or against a specific candidate" (Pet. App. 30a). The majority indicated that the ratings belong in the category of "permissible voter education activities" (*id.* at 28a), reasoning that "[t]he ratings are based on each candidate's professional experience and technical ability as compared to standards that petitioner intends to be objective," rather than on "partisan or political preferences" or "comparisons between candidates seeking the same office" (*id.* at 31a).

Judge Chabot, joined by five other judges, dissented (Pet. App. 32a-41a). He noted that the majority's assertions that petitioner's ratings are "objective" and "nonpartisan" provide no basis for avoiding the statutory prohibition (*id.* at 36a). He also stated that "[w]hat petitioner did is far from what most would regard as voter education" (*id.* at 37a). He concluded that petitioner's activities violate the Section 501(c)(3) limitation because "[p]etitioner 'flatout' told the public that certain candidates for public office should be voted for and other candidates should be voted against [and] [i]t made an effort to get this message to the voting public by issuing press releases" (Pet. App. 40a). Judge Jacobs, joined by two judges, wrote a separate dissent (*id.* at 41a). He explained that petitioner's

rating activity "constitutes a prohibited intervention" because "[w]here more than one candidate seeks an elected judicial office, petitioner's rating of one candidate higher than another is tantamount to an endorsement by petitioner of the candidate it deems more qualified" (*ibid.*).

3. The court of appeals unanimously reversed, holding that petitioner's rating activity falls squarely within the electioneering proscription of Section 501(c)(3) (Pet. App. 1a-13a). The court concluded that, even if the ratings are in the public interest, they express a preference for one candidate over another and therefore violate Section 501(c)(3)'s requirement that charitable organizations remain neutral in political affairs (*id.* at 5a, 9a). The court disagreed with petitioner's assertion that the ratings involve merely the collection and dissemination of "objective data," stating that "[a] representation that a candidate is able and has proper character and temperament is simply a subjective expression of opinion" (*id.* at 10a). The court also rejected petitioner's assertion that the ratings constitute neutral voter education activities; the court stated that "[p]ublished expressions of such opinion, made with an eye toward imminent elections, are a far cry from" voter education activities that the IRS has found to be permissible in the past (*id.* at 10a).

ARGUMENT

The court of appeals correctly held that petitioner is not entitled to tax-exempt status under Section 501(c)(3) because it rates candidates for elective judgeships as "approved" or "not approved" and publicizes those ratings with a view to influencing the outcome of elections. The court's decision that this activity constitutes participating or intervening in political campaigns within the meaning of Section 501(c)(3) does not conflict with any decision of

this Court or of another court of appeals. Accordingly, there is no reason for review by this Court.

1. Restrictions upon the legislative and political involvements of tax-exempt charitable organizations date back to the Revenue Act of 1934. That statute expressly provided that an organization, otherwise qualifying as "religious, charitable, or educational," was not entitled to a tax exemption or to have contributions to it be tax-deductible, if a substantial part of its activities was "carrying on propaganda, or otherwise attempting, to influence legislation." Revenue Act of 1934, ch. 277, §§ 23(o)(2), 101(6), 48 Stat. 690, 700. As this Court observed in *Cammarano* v. *United States,* 358 U.S. 498, 512 (1959), those provisions, as carried forward into the 1939 and 1954 Codes, express "a sharply defined policy" that " 'political agitation as such is outside the statute, however innocent the aim. * * * Controversies of that sort must be conducted without public subvention; the Treasury stands aside from them.' " This policy is a neutral one that does not turn upon the motivations of the organization or the subject of its political activity. Accordingly, this Court twice has rejected First Amendment challenges to the lobbying restrictions of the Code and regulations, reasoning that they are neutral respecting the content of an organization's advocacy and do not " 'ai[m] at the suppression of dangerous ideas.' " *Regan* v. *Taxation With Representation,* 461 U.S. 540, 548 (1983); *Cammarano* v. *United States,* 358 U.S. at 512-513; see also *id.* at 515 (Douglas, J., concurring).

In reenacting the exemption for charitable organizations as part of the 1954 Code, Congress added the proviso at issue here, requiring that a Section 501(c)(3) organization "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office." (ch. 736,

§ 501(c)(3), 68A Stat. 163 (1954)). This prohibition was extended in 1969 to the provisions governing the deductibility of charitable contributions, making it explicit that a charitable organization that participates or intervenes in any political campaign is ineligible to receive tax-deductible gifts. See Sections 170(c)(2) (income tax), 2055(a)(2) (estate tax), and 2522(a) (gift tax), as amended by the Tax Reform Act of 1969, Pub. L. No. 91-172, § 201, 83 Stat. 549. The House and Senate Reports on the 1969 Act explain that the principal aim of this limitation is to prevent charities from using tax-exempt or tax-deductible dollars to further the cause of a candidate in a public election. The Reports observe that the legislative policy against such tax subsidies is "clear," and that, under the charitable exemption provisions, "no degree of support for an individual's candidacy for public office is permitted." H.R. Rep. No. 413, 91st Cong., 1st Sess. Pt. 1, at 32 (1969); S. Rep. No. 552, 91st Cong., 1st Sess. 47 (1969). Congress reaffirmed this policy again in 1987 when it made a change in the language of Section 501(c)(3) (see note 3, *supra*). The House Report on that legislation stated that "[t]he prohibition on political campaign activities and the restrictions on lobbying activities by charities reflect Congressional policies that the U.S. Treasury should be neutral in political affairs" (H.R. Rep. No. 391, 100th Cong., 1st Sess. 1625 (1987)).

2. Petitioner's practice of rating candidates for elective judgeships violates the express terms of Section 501(c)(3)'s limitation that a qualifying charitable organization "not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of (or in opposition to) any candidate for public office." Those whose qualifications for election petitioner evaluates clearly are "candidates for public office" within the meaning of the statute; that phrase has long been de-

fined by regulation as "a contestant for an elective public office, whether such office be national, State, or local." Treas. Reg. § 1.501(c)(3)-1(c)(3)(iii). And the public dissemination of the ratings plainly constitutes "participat[ion] or interven[tion] in * * * political campaign[s]" on behalf of the candidates who are "approved" and in opposition to those who are "not approved." Indeed, petitioner's rating activity falls within the precise example given in the statute itself as an illustration of impermissible political activity, the "publishing or distributing of statements." As a practical matter, petitioner's rating system is no different from the issuance of endorsements urging the electorate to vote for certain candidates and not for others.[5] Although the ratings are terse, they suffice to get their point across, they are widely circulated, and they carry the weight of petitioner's prestige.

The impact of petitioner's rating activity on the political process is no accident; the ratings implement petitioner's declared intent of influencing the candidates' success or failure at the polls. Petitioner's by-laws state as one of its objectives to "secure the * * * election" of candidates whom it considers to be "qualified" and to "prevent the * * * election" of candidates whom it considers to be "unqualified" (Pet. App. 6a). To that end it publicly disseminates the ratings through press releases. As the Tax Court cogently observed (*id.* at 31a), "there obviously would

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[5] Petitioner does not necessarily take a position in every campaign that is equivalent to an endorsement of one candidate over another. If both candidates receive the same rating, and petitioner issues no further information, then its rating may not seek to induce the electorate to vote for a particular candidate rather than his named opponent. But in those situations where competing candidates receive different ratings, petitioner's dissemination of its ratings undeniably has the effect of intervening in the election by seeking to influence voters to cast their ballots for or against a particular candidate.

be no point to making the ratings if they were kept secret, and it is equally obvious that the ratings are published with the hope that they will have an impact on the voter." Indeed, petitioner acknowledged below that the ratings attempt to "ensure" that candidates whom it views as unqualified are not elected to office (*id.* at 11a). Empirical evidence, moreover, indicates that judicial ratings of this type do influence the electorate (*id.* at 7a). Accordingly, petitioner's rating activity is inconsistent with the language of Section 501(c)(3)'s prohibition upon electioneering and with its underlying principle that such campaign activity may not be conducted by a tax-exempt charity.

3. a. Petitioner contends that Section 501(c)(3)'s proscription against participating in political campaigns does not apply to its rating activity. Its main argument is that the ratings are permissible because they are "disinterested [and] nonpartisan" and "conducted as a public service" (Pet. 7, 9). The court of appeals correctly rejected this argument. As the court explained (Pet. App. 5a, 9a), the narrow question here is not whether the ratings perform a public service—the First Amendment, after all, assumes that political campaigning in general performs a public service—but rather whether petitioner's activities violate Section 501(c)(3)'s requirement that tax-exempt charitable organizations refrain from taking sides in election campaigns. Whether or not petitioner acts in an objective and nonpartisan manner in making its ratings, its activity supports one candidate over another and hence violates the statutory limitation.[6]

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[6] There is no merit to petitioner's suggestion (Pet. 8-9) that the statutory limitation should not apply to its activities because, irrespective of its ratings, New York "voters overwhelmingly support the nominee of the dominant Democratic Party" (Pet. 3). Plainly, application of the statutory limitation does not depend upon the success or effectiveness of the charity's electioneering activity, nor would it be

Moreover, petitioner's ratings violate the spirit, as well as the letter, of Section 501(c)(3). Though designed to further the public interest, even the Tax Court acknowledged that petitioner's ratings, like any other organization's political endorsement, "by their very nature, necessarily will reflect the philosophy of the organization" (Pet. App. 31a; see also *id.* at 10a). A similar contention to petitioner's could be made by any number of "nonpartisan" interest groups that rate candidates according to the degree to which their views, record, or qualifications accord with the group's philosophy. It is precisely to avoid discriminating among organizations according to their philosophies that the statutory prohibition upon political conduct by tax-exempt charities, like the similar restriction upon their lobbying, does not depend upon whether the cause or candidate favored by a charity is good or bad, competent or incompetent, orthodox or radical. As the Court of Claims stated in connection with the lobbying limitation, "the tax laws are not an appropriate vehicle for the Government to undertake to determine the extent to which a charitable organization's attempts to influence legislation involve the public interest or are to further other interests" (*Haswell* v. *United States,* 500 F.2d 1133, 1150 (1974), cert. denied, 419 U.S. 1107 (1975)). See also *Kuper* v. *Commissioner,* 332 F.2d 562, 563 (3d Cir.), cert. denied, 379 U.S. 920 (1964) ("Congress wisely refrained from distinguishing between types of legislation."). This neutral, hands-off statutory policy denying Section 501(c)(3) status to any organization that throws its weight behind one candidate or another in an election enables the government to steer clear of discrimination with respect to granting tax benefits and of possible First Amendment dif-

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feasible for the IRS to assess that effectiveness in every case in which it must make a determination whether to grant tax-exempt status.

ficulties. And this statutory policy requires denial of petitioner's request for Section 501(c)(3) status, "[r]egardless of petitioner's motives" in rating judicial candidates (Pet. App. 41a (Jacobs, J., dissenting)).

b. The court of appeals likewise was correct in rejecting petitioner's argument (Pet. 6-9) that its rating activity amounts to voter "education" permitted by Section 501(c)(3). As Congress explained in the legislative history of the 1987 amendments, "neutral voter education activities," *i.e.*, those that are neither "on behalf of" nor "in opposition to" a candidate, are permissible under Section 501(c)(3). H.R. Conf. Rep. No. 495, 100th Cong., 1st Sess. 1021 (1987). Thus, the Commissioner has ruled that a charitable organization may publish certain objective information (such as the voting records of incumbents or candidates' responses to questionnaires) that lets readers draw their own conclusions about the fitness of a candidate for elective office. See Rev. Rul. 78-248, 1978-1 C.B. 154. The organization, however, must avoid "evidencing a bias or preference with respect to the views of any candidate" (*ibid.*), attempting to "promote or advance one candidate over another" (Rev. Rul. 86-95, 1986-2 C.B. 73), or making a "comment * * * on an individual's overall qualifications for public office" (Rev. Rul. 80-282, 1980-2 C.B. 178). The court of appeals correctly observed that "[t]he inapplicability of these criteria to the activities of [petitioner] is readily apparent" (Pet. App. 11a).

More generally, the term "education" under Section 501(c)(3) connotes a "full and fair exposition" that permits the public to form an independent conclusion; it does not mean "the mere presentation of unsupported opinion." See Treas. Reg. § 1.501(c)(3)-1(d)(3). There is little or no "education" in petitioner's ratings in the sense intended by the tax law. See Pet. App. 12a. They are merely terse announcements in favor of or against a particular candidate

that give the voters no explanation of why they should cast their ballots that way, other than that it is petitioner's opinion that they should.

4. Petitioner's concern that "[t]he decision below will have a negative impact on the organized bar's efforts to aid in the selection of qualified jurists" (Pet. 5) is an objection that should be made to Congress, not to this Court (see Pet. App. 13a, 40a-41a (Chabot, J., dissenting)). In any event, this concern is considerably overstated. The applicable Revenue Rulings provide guidance regarding the political education activities that an organization may conduct without running afoul of the statutory prohibition against electioneering. For example, if petitioner were to sponsor a public forum where competing candidates for elective judgeships each have a fair chance to present their qualifications and positions, such activity might well be consistent with Section 501(c)(3) status so long as it is performed on a neutral basis.

Moreover, the tax consequences of the statutory restrictions can often be ameliorated by an association's adoption of a dual structure, whereby some or all of its charitable and educational functions are split off and conducted through one or more separate foundations that qualify under Section 501(c)(3) and hence are eligible to receive tax-deductible charitable donations. See *Regan* v. *Taxation With Representation,* 461 U.S. at 544; *id.* at 552-553 (Blackmun, J., concurring). The American Bar Association and its affiliates are structured in this way, with part operating as a "business league" under Section 501(c)(6) like petitioner and other parts operating with a charitable Section 501(c)(3) exemption. See *United States* v. *American Bar Endowment,* 477 U.S. 105, 107 (1986). Because it operates out of a single entity, however, petitioner's involvement in political campaign activity disqualifies it from obtaining an exemption under Section 501(c)(3).

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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